AFFIN BANK BHD

v.

ZULKIFLI ABDULLAH

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: D4-22A-67-2005]
29 DECEMBER 2005

BANKING: *Islamic banking - Loan facility - Al-Bai Bithaman Ajil, principles of - Default in repayment - Rights of loan provider - Scope and extent - Whether could claim profit margin in respect of unexpired tenure - Claim for unearned profit margin - Whether unfair to borrower - Whether against principle of facility*

LAND LAW: *Charge - Order for sale - Loan granted under Al-Bai Bithaman Ajil facility - Default - Remedies of chargee - Whether entitled to order for sale - Cause to the contrary - National Land Code, ss. 256, 257 - Rules of the High Court 1980, O. 83*

In 1997, and subsequently by a revised agreement in 1999, the defendant took a secured housing loan of RM394,172.06 from the plaintiff bank through the Islamic financing scheme of Al-Bai Bithaman Ajil ('the facility'). *Inter alia,* the facility specified that upon default, the defendant would repay not only the sum loaned but also the bank's profit margin spanning through the 25-year tenure of the facility (pre-quantified and known as the 'bank selling price'). The defendant defaulted in 2002 after paying the bank RM33,454.19, and the bank, pursuant to the terms of the facility, claimed from the defendant the bank selling price of RM958,909.21 and applied for an order for sale of the charged property. The defendant was distraught that the facility, just 2 years and 8 months after it was given, had blossomed into a claim for debt amounting to RM958,909.21, and in the circumstances took umbrage at the inherent principles of the facility, and the bank's right to obtain an order for sale thereunder. Upon the facts as presented to the court, the learned judge, rather justifiably, examined the facility in its substance, particularly as to the defendant's rights *vis-a-vis* a borrower under a conventional loan – and framed the following question for determination, namely: what was the amount that the defendant, after having paid RM33,454.19 in installments for the loan, had to pay the bank under the facility on the date of the order for sale (if granted).

Held (allowing claim albeit for a reduced sum and granting order for sale):

[1] Under a conventional loan, a defaulter need only to pay the loan amount plus accrued interest and other charges and, upon a disposal of the property at market value, there is usually little that he has to add in order to be released from liability. Further, in the event of default before the end of tenure, the sum the borrower has to pay is limited to the period from the release of the loan until full settlement thereof. On the contrary, under the Al-Bai Bithaman Ajil scheme, the bank claims the loan amount as well as the profit margin thereon for the full tenure of the facility. Thus, while no interest is applied in a conventional loan upon the unexpired tenure, the bank here seeks to claim a profit on the unexpired tenure as well.

[2] The substance of the Property Sale Agreement in the facility is that, it is not a sale price paid by a single payment but by a series of equal monthly installments. It is also a substance of the transaction that profit margin is not a profit arising from a sale price arrived at in a bargain, but based upon the agreed amount and tenure of the facility and the profit rate of the provider. The sale price is then the sum of the provider's purchase price and the profit margin. Further, the profit rate is based on an agreed real or actual profit of the provider expressed as a percentage, and not an interest that is being charged regardless. The profit margin is thus a function of the bank purchase price, the agreed profit rate on a constant rate of return and monthly rests, and the agreed tenure of the facility, and calculated with the profit rate applied to the full tenure of the facility.

[2a] Since the defendant is required to pay the profit for the full tenure, he must be entitled to have the benefit of the full tenure. It follows that, it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. Furthermore, the sum that is recovered from the facility in the event of default before the end of tenure is applied to other facilities and the bank continues to earn its profit rate on the same sum. Hence, to allow the bank to also recover a profit margin for the unexpired tenure of the

facility means that the bank is able to earn a profit **twice** upon the same sum at the same time. Likewise, the profit margin that continues to be charged on the unexpired part of the tenure cannot be actual profit. It is clearly unearned profit and therefore contradicts the principle of Al-Bai Bithaman Ajil. Obviously, if the profit has not been earned, it is not a profit and cannot be claimed under the facility.

[2b] The argument that the bank could give rebate, which is entirely discretionary, is irrelevant and not an answer to the question of whether in the event of early termination of the facility upon default, the bank is entitled to the unearned profit margin on the unexpired tenure.

[3] The profit margin of the facility is calculated from: (i) the agreed profit rate (at 9% per annum); (ii) the tenure of the facility (300 months); and (iii) the amount of the facility (the sale price). The profit margin could thus be derived with certainty. Even if the tenure is shortened, the profit margin could be recalculated with equal certainty.

[3a] Upon the calculations placed before the court, the bank profit at the agreed profit rate of 9% per annum on RM394,172.06 would be RM35,475.49 per annum or RM2959.29 per month or RM98.54 per day. Between 1 November 1999 to the date of judgment on 29 December 2005 was a period of 74 months less 2 days, thereby earning a profit of RM218,767.49. As agreed, the bank is also entitled to a penalty of 3141.44 and, added to the bank purchase price of RM394,172.06, the total due on the date of judgment is RM616,080.99. However, after crediting the defendant with his payment of RM33,454.19, the balance due on the date of judgment is RM582,626.80. The bank is also entitled to profit per day hereafter until full payment at RM98.54 per day.

[4] The bank is entitled to rely upon the existing registered charge to recover the outstanding sum from the defendant arising from the terms of the facility as accepted by the defendant on 3 November 1999. The statutory procedural requirements had been complied with and there was nothing then to bring the application before the court within the categories of 'cause to the contrary' to warrant the refusal of the order for sale. The court would therefore grant an

order for sale by auction under the National Land Code to recover the sum of RM582,626.80 plus profit at RM98.54 per day until full settlement.

Obiter:

[1] When the gratification of being able to satisfy the pious desire to avoid financing containing the elements of **Riba** gives way to the sorrow of default before the end of tenure of an Al-Bai Bithaman Ajil facility, the revelation that there remains still a very substantial sum owing to the bank, even after the subject security had been auctioned at full market value, comes as a startling surprise. All the more shocking when it is further realised that a borrower under an interest-ridden loan is far better off.

[Order accordingly]

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2005] 5 AMR 381

Bank Islam Malaysia Bhd v. Adnan Omar [1994] 3 CLJ 735 HC

Bank Islam Malaysia Bhd v. Shamsuddin Hj Ahmad [1999] 1 LNS 275

Bank Kerjasama Rakyat Malaysia v. Emcee Corporation [2003] 1 CLJ 625 CA

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC

Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 SC

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC

The Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd [1997] 4 CLJ 170 CA

Legislation referred to:

National Land Code, ss. 256, 257(1)(e)-(h)

Rules of the High Court 1980, O. 83 r. 3(3)(a), (c), (d), (7)

Other source(s) referred to:

Conveyancing, Banking and Commercial Practice: An Islamic Perspective [1994] 4 BLJ lxxi

For the plaintiff - Allen Miranda (Malathi Subramaniam with him); M/s AI Nathan & Isa Aziz Ibrahim

For the defendant - Muhamad Nazri Muhamad; M/s Khatijah Chia & Nazri

Reported by WA Sharif

JUDGMENT

Abdul Wahab Patail J:

[1] The defendant Zulkifli bin Abdullah ("the defendant") is sued by the plaintiff Affin Bank Berhad ("the bank") in D4-22A-159-2003 for an order for sale to recover sums outstanding under a 1997 Al-Bai Bithaman Ajil facility ("the 1997 facility") released on 8 December 1997 and amended by revision in 1999 ("the 1999 revised facility"); and in D4-22A-67-2005 for amount outstanding from the 1999 revised facility amounting to RM958,997.94 as at 30 June 2002; interest thereon at 8% from the date of judgment to date of full settlement, costs and such other orders as the court thinks fit.

[2] The defendant bought a double storey corner link house from the vendor, Mohamed Nazir bin Mohamed Yusoff ("the vendor") for the sum of RM385,000 ("the principal agreement"). He paid a deposit of RM39,000. A balance of RM346,000 remained to be paid.

[3] He requested the bank, who was his employer at that time, for a home Islamic financing facility under the Syariah principle of Al-Bai Bithaman Ajil. The Al-Bai Bithaman Ajil is the Syariah principle which involves the purchase of a property and the sale and payment of the sale price which includes a profit margin upon deferred payment terms. The bank agreed, and granted to the defendant the 1997 facility.

The 1997 Facility

[4] As is usual at the time under an Al-Bai Bithaman Ajil facility, the bank at the request of the defendant and with the consent of the vendor became a party to the principal agreement with the intent that the bank be deemed to be the purchaser in place of the defendant from the date of the principal agreement to pay the vendor the balance price of RM346,000. This is effected through a Novation Agreement executed on 8 December 1997 ("the Novation Agreement"). The defendant was, therefore, given a RM346,000 facility. That facility amount was described as the bank purchase price. On the same date, the bank sold the property to the defendant. The defendant signed as purchaser a property sale agreement ("the property sale agreement") pursuant to which the defendant agreed to purchase the property from the bank and to pay the bank's selling price by the installments set

A out in the Second Schedule. The defendant was also required to execute a registered charge ("the charge") against the title to secure the installments payments. The Novation Agreement, the property sale agreement and the charge comprise the documentation of the 1997 facility.

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[5] The 1997 facility was to be repaid over an 18 year tenure by 216 monthly installments of RM3,582.80 subject to a reduction, by the application of the Islamic Principle of Ibra, for so long as the defendant remained the bank's employee, of C RM1,421.47. Thus, the monthly installments was RM3,582.80 – RM1,421.47 = RM2,161.33. The total payments over 216 installments, so long as he remained an employee, was therefore RM2,161.33 x 216 = RM466,847.28. This RM466,847.28 was described in the letter of offer of 26 May 1997 as the bank selling D price and the property sale agreement as the sale price. For this reason, the terms "sale price" and "bank selling price" can be used interchangeably.

The 1999 Revised Facility

E **[6]** At the end of December 1997 the defendant left his employment with the bank. Having paid RM7,500 in installments he defaulted, he requested a restructuring of the RM346,000 facility. By a letter dated 1 November 1999, the bank agreed. The terms set out in the letter dated 1 November 1999 was accepted F by the defendant on 3 November 1999 (the 1999 revised facility). Although the letter of 1 November 1999 required the parties to execute a fresh set of documentation, no such documentation was executed. The letter of 1 November 1999 and acceptance thereon on 3 November 1999 constitute the sole document for the 1999 G revised facility. It described the purpose of the revised terms as:

> To restructure the existing Al-Bai Bithaman Ajil facility by recapitalisation the current outstanding of RM335,251.60 plus the profit income in arrears for twenty months amounting to RM58,920.46.

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[7] The sum RM335,251.60 + RM58,920.46 = RM394,172.06 is not disputed. This is described by the bank as the "Revised Bank Purchase Price" (Revised Purchase Price). Thus, the facility for RM346,000 in the 1999 facility was revised as facility for I RM394,172.06 in the 1999 revised facility. The tenure under the revised facility was 25 years. The tenure would end 31 October 2024. The defendant was to pay by 60 monthly installments of

RM2,500 and thereafter 240 monthly installments of RM3,509.84. The total payments over 25 years would be (RM2,500 x 60) + (RM3,509.84 x 240) = RM992,361.60. The bank gave its revised Bank Selling Price as RM992,363.40 (Revised Selling Price). The difference RM992,363.40 - RM992,361.60 = RM1.80 arises out of rounding-up to two decimal points and is immaterial. For all purposes, therefore, the Revised Selling Price is RM992,363.40.

Default Of 1999 Revised Facility & The Claim

[8] After making several payments totaling RM33,454.19, the last of which was on 5th June 2001, the defendant again defaulted. On 1 August 2002, a notice of default in Form 16D of the National Land Code was issued, seeking the repayment of RM958,997.94. Subsequently two actions were filed. This action D4-22A-159-2003 was filed to obtain an order for sale. The second action D4-22A-67-2005 was filed to recover such sums in the event of a deficiency in the proceeds of sale. Since the primary issue is the amount that is due from the defendant in the circumstances of a default under an Al-Bai Bithaman Ajil facility, the parties agreed that the decision in D4-22A-159-2003 would be binding in D4-22A-67-2005.

[9] At trial, the bank claims that since the Bank Selling Price is RM992,363.40, and the defendant had paid only RM33,454.19, the balance due from the defendant under the 1999 revised facility is RM992,363.40 - RM33,454.19 = RM958,909.21.

Amount Payable Upon Default Of Al-Bai Bithaman Ajil Facility

[10] The general issue before this court is what is the amount that a customer has to pay to the provider of an Al-Bai Bithaman Ajil facility in the event of a default. In this case, that issue is what is the amount the defendant, after having paid RM33,454.19 in installments, has to pay to the bank under the 1999 revised facility on the date of the order for sale?

[11] In plain terms, the defendant's predicament is that two years and eight months after it was given, the 1999 Revised Facility became a claim for a debt of RM958,909.21. Even if the market value of the security under the charge were, say, RM400,000, and that price is obtained at auction, the defendant would still owe another RM558,909.21.

[12] In contrast, under a conventional loan, the defaulter would only be required to pay the loan amount plus accrued interest and other charges, including late payment interest. Upon a similar assumption of disposal of the property at market value, there is usually little the defaulter has to add in order to be released from further liability.

[13] The reason for the difference is that in the event of a default before the end of tenure, the sum the borrower in a conventional loan has to pay over and above the sum borrowed, ie, the interest and late payment interest, is limited to the period from release of the loan until full settlement and not for the full original tenure of the loan; while in this case, the bank claims under the Al-Bai Bithaman Ajil facility the "sale price" or "bank selling price" which is the sum of the facility given out as "purchase price" or "bank purchase price" and the profit margin thereon for the full tenure of the facility. In other words, while in a conventional loan no interest is applied upon the unexpired tenure, the bank in this case seeks to claim a profit on the unexpired tenure also.

Case Law

[14] The case of *Bank Islam Malaysia Berhad v. Adnan bin Omar* [1994] 3 CLJ 735; [1994] 3 AMR 44 involved an Al-Bai Bithaman Ajil facility of RM265,000 to Adnan bin Omar. The tenure was 180 months = 15 years from 2 March 1984. The bank purchase price was therefore RM265,000. The bank selling price was RM583,000. The payment of monthly installments was secured by a charge. He defaulted on installment payments since April 1985. An originating summons was filed in 1992. The bank claimed RM583,000. The judgment on 18 July 1994 granted an order for sale to "recover the amount of the advance under O. 83 r. 3(3)(a) as being RM583,000". Thus, a facility of RM265,000 became a debt of RM583,000, and even if on auction the full purchase price of RM265,000 was obtained, the defendant still owed RM318,000.

[15] In *Bank Islam Malaysia Bhd v. Shamsuddin bin Haji Ahmad* [1999] 1 LNS 275, the Al-Bithaman Ajil facility obtained was RM150,000. The learned judge followed *Bank Islam Malaysia Berhad v. Adnan bin Omar* [1994] 3 CLJ 735. The defendant was ordered to pay the bank selling price of RM217,500. Again if the market value of the property were RM150,000 and that price were obtained on auction, the defendant still owed RM67,500.

[16] When the gratification of being able to satisfy the pious desire to avoid financing containing the elements of Riba gives way to the sorrow of default before the end of tenure of an Al-Bai Bithaman Ajil facility, the revelation that even after the subject security had been auctioned at full market value there remains still a very substantial sum still owing to the bank, comes as a startling surprise. All the more shocking when it is further realised that a borrower under a Riba-ridden loan is far better off.

[17] The consequences of a default under the Al-Bai Bithaman Ajil facility proved to be far more burdensome upon the unfortunate and bewildered defaulter. It spawned various reactions.

The Reactions

[18] In an article Islamic/Interest-Free Banking in Malaysia: Some Legal Considerations, Mohd Illiayas summarised the defendant's challenge in *Bank Islam Malaysia Berhad v. Adnan bin Omar* as follows:

(i) that there was non-compliance with O. 83 r. 3(3)(a) in that the sum of RM583,000 (that is, the price inclusive of the bank's profit at which was to be paid by 180 monthly installments) stipulated as payable by the defendant in the charge and in the affidavit in support of the originating summons was wrong as the amount actually disbursed by the bank under the facility was only RM265,000 (that is, the price at which the bank first purchased the property from the defendant under the facility);

(ii) that there was non-compliance with O. 83 r. 3(3)(c) and 3(7) in that the affidavit did not provide particulars of the interest due to the bank; and

(iii) that there was non-compliance with O. 83 r. 3(3)(d) as the amount stated in the affidavit as remaining unpaid under the charge was not correct for it was subject to a reduction by 'muqassah' (a rebate) that the bank had granted to the defendant on account of the early recovery of the sum owing, that is prior to the 15-year payment period under the facility.

[19] The writer commented in that article:

> The Shah Alam High Court's decision in *Bank Islam Malaysia Bhd v. Adrian bin Omar* showed how glaringly inadequate the existing legal framework is in the implementation and the enforcement of Islamic banking documents in Malaysia.

The writer's suggestion was to amend O. 83 and various laws, and to consider setting up of an Islamic division in the High Court with judges qualified in both civil law and Islamic law. In the latter suggestion he referred to a similar suggestion in *Conveyancing, Banking and Commercial Practice: An Islamic Perspective* [1994] 4 BLJ lxxi by Mohamed Ismail Shariff who incidentally was the counsel for the defendant Adnan bin Omar. The writer, Mohd Illiayas, also suggested that in the meantime it may be necessary, in the documents relating to Islamic transactions, to provide for disputes arising thereunder to be referred to mediation or arbitration by suitable persons, which would entail suitable changes to existing laws and procedural rules.

[20] Like the submissions in the cases, these suggested solutions do not address specifically the question whether the provider of an Al-Bai Bithaman Ajil facility can, in the event of a default before the end of tenure, claim as part of the sale price or bank selling price the profit margin for the unexpired tenure of the facility.

Reference To The National Syariah Advisory Council

[21] An initial thought was to consider referring the question to the National Syariah Advisory Council under the Banking and Financial Institutions Act after first ascertaining all the relevant facts. In considering that course of action, this court is guided by the Court of Appeal in *Bank Kerjasama Rakvat Malaysia v. Emcee Corporation* [2003] 1 CLJ 625 where Abdul Hamid Mohamed JCA writing the judgment for the Court of Appeal said:

> As was mentioned at the beginning of this judgment, the facility is an Islamic facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.

[22] Since the question before the court is the interpretation and application of the terms of the contractual documents between the parties and of the decisions of the courts, reference of this case to another forum for a decision would be an indefensible abdication by this court of its function and duty to apply established principles to the question before it. It is not a question of Syariah law. It is the conclusion of this court, therefore, that there is no necessity to refer the question to another forum.

Application Of Law

[23] To understand the *ratio decidendi* or the basis of the decision in *Bank Islam Malaysia Berhad v. Adrian bin Omar*, it must be kept in mind that the submissions put before the learned Judicial Commissioner were that the amount disbursed was not RM583,000, that O. 83 Rules of the High Court 1980 were not complied with or did not apply, and because a rebate was due the sum claimed was incorrect. When the submissions were rejected, an order for the payment of RM583,000 was, procedurally speaking, correctly made. The submissions, however, did not address the substance of the term "sale price" itself and the actual amount due pursuant to it. Similarly in *Bank Islam Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2005] 5 AMR 381. It cannot, therefore, be said that these cases have specifically established case law that the provider of an Al-Bai Bithaman Ajil facility is entitled to the profit margin for the whole original tenure when the facility is terminated before the end of its tenure.

Basis Of Claim By The Bank

[24] The basis of the sale price claimed by the bank is section 7.02 of the Property Sale Agreement on consequences of a default by the customer of a facility. The section provides:

> If the Customer shall commit a default pursuant to Section 7.01 or if any of the events stipulated in Section 7.01 hereof shall happen and which if capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Bank requesting remedy of the same, or is not remedied within the time specifically stipulated therefor (if any) in respect of the event in question, the Sale Price and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and

A payable and whereupon the Bank shall be entitled without further notice to the Customer to enforce the Charge and or the Letter of Set-Off and all of the remedies available under the law.

That "sale price" that became forthwith due and payable is set out in section 1.01 of the property sale agreement as follows:

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The Bank hereby agrees to sell and the Customer hereby agrees to purchase the Property free from all encumbrances but subject to the conditions of title express or implied in the document of title to the Land and with vacant possession at the purchase price stated in Section 8 of the First Schedule hereto (hereinafter called the Sale Price).

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Section 8 of the First Schedule provides as "The Sale Price":

Ringgit Malaysia: Four Hundred Sixty Six Thousand Eight Hundred And Forty Seven And Sen Twenty Eight (RM466,847.28) Only.

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In the revised selling price in this case, that sale price is RM992,363.40. This is the sale price that the bank now relies upon in its claim.

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Meaning Of "Sale Price" Or "Bank Selling Price"

[25] Although the term "sale price" appear to be set out clearly enough in the Property Sale Agreement, that is only the appearance of the term at face value.

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[26] In *Malayan Banking Bhd v. PK Ralamani* [1994] 2 CLJ 25 SC where the appellant had admitted it had granted the borrower a new facility, and the new interest rate was no longer 9% as in the previous facilities but 10%, and the question before the Supreme Court on appeal was whether it was indeed a new facility as stated, the Supreme Court said:

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It may also be true that the appellant had admitted that it had granted to the borrower a new facility of RM60,000 subject to its terms and conditions mentioned therein. We also do not dispute that the prescribed rate of interest is 10% pa, and therefore different from the first and second facilities of 9% pa. *However it does not necessarily follow from these facts that the said letter creates a new facility. In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance* (see *Woo Yew v. Yong Yang Hoo* and *Addiscombe Garden Estates Ltd v. Crabbe*).

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[27] The substance of the sale price in the Property Sale Agreement in an Al-Bai Bithaman Ajil facility, is that it is not a sale price paid by a single payment but it is a series of equal monthly installments. It is also a substance of the transaction that profit margin is not a profit arising from a sale price arrived at in a bargain, but is based upon the agreed amount and tenure of the facility and the profit rate of the provider. The sale price is then the sum of the provider's purchase price and the profit margin.

[28] The essence of the profit rate is that it is based on an agreed real or actual profit of the provider expressed as a percentage, and not an interest rate that is being charged regardless. The profit margin is a function of the bank purchase price, the agreed profit rate on a constant rate of return and monthly rests, and the agreed tenure of the facility. It must be borne in mind that profit margin is calculated with the profit rate applied to the full tenure of the facility during which the installments are to be made. The sale price is then paid by monthly installments according to the number of months in the tenure of the facility.

[29] That being the case, it follows that if the customer is required to pay the profit for the full tenure, he is entitled to have the benefit of the full tenure. It follows that it would be inconsistent with his right to the full tenure if he could be denied the tenure and yet be required to pay the bank's profit margin for the full tenure. Furthermore, the sum that is recovered from the facility in the event of default before the end of tenure is applied to other facilities and the bank continues to earn its profit rate on the same sum. To allow the bank to also recover a profit margin for the unexpired tenure of the facility, means the bank is able to earn a profit twice upon the same sum at the same time. That profit margin that continues to be charged on the unexpired part of the tenure cannot be actual profit. It is clearly unearned profit. It contradicts the principle of Al-Bai Bithaman Ajil as to the profit margin that the provider is entitled to. Obviously, if the profit has not been earned it is not profit, and cannot be claimed under the Al-Bai Bithaman Ajil facility.

The Rebate

[30] It was submitted for the bank that the bank receiving the profit margin for the full unexpired tenure could give a rebate but such rebate is discretionary. The muqassah referred to in *Bank*

Islam Malaysia Berhad v. Adnan bin Omar is the rebate. There is some question whether the rebate is properly termed muqassah or Ibra. Whether the rebate is actually muqassah or Ibra is of academic interest only in this case. It has not been raised as a relevant dispute in this case.

[31] Rebates are commonly to be found in the event of pre-payment in hire purchase agreements. In the case of goods where the Hire Purchase Act 1967 applies, the hirer is entitled to a statutory rebates on terms charges and insurance in the event of pre-payment. Even though the Al-Bai Bithaman Ajil facility is not a hire purchase agreement, it does not necessarily follow that because it is not a hire purchase then the opposite must be true, that is that no rebate is payable except on a purely discretionary basis.

[32] The argument that the bank can give a rebate, and that it is entirely discretionary is, in my view, irrelevant and is not an answer to the question before this court which is whether in the event of early termination of the facility upon default, the bank is entitled to the profit margin on the unexpired tenure and therefore unearned. Since the matter is disputed and is before the court, and it is a triable issue, the court cannot leave it to one party to decide at its discretion to give back as a rebate.

Certainty And Reality Of The Profit Margin

[33] An important feature of the profit margin resulting from it being a part of the sale price is that it must be certain.

[34] The profit margin in an Al-Bai Bithaman Ajil facility is calculated from: (a) the agreed profit rate; (b) tenure the facility is required and (c) the amount of the facility. The amount of the facility is the bank purchase price. In this case the applicable profit rate at the time was 9% per annum. The tenure was 300 months. The profit margin could be calculated and derived with certainty. Even if the tenure is shortened, the profit margin could be recalculated with equal certainty.

[35] That the sale price is recalculated and profit margin is not charged for the full tenure in the event of default has been demonstrated and practised by the bank in its letter dated 1 November 1999 where it explained in respect of the original facility that the defendant had defaulted upon, that the bank recapitalised the then current outstanding amount of RM335,251.60 plus profit

arrears for 20 months amounting to RM58,920.46 to arrive at the sum of RM394,172.06. This RM394,172.06 is then termed in the letter of 1 November 1999 as the bank's purchase price.

[36] It is clear that in doing so, the bank did not demand from the defendant the full sale price, without the Ibra deduction, as at the end of December 1997 which would have been RM3,582.80 x 216 = RM773,884.80, or even with full Ibra deduction, RM466,847.28, but set the amount at RM335,251.60 on that date and made revised terms upon that basis sum.

Balance Due 29 December 2005

[37] According to the calculations placed before the court for the bank, the bank profit at the agreed profit rate of 9% per annum on RM394,172.06 is RM35,475.49 per annum or RM35,475.49/ 12 = RM2,956.29 per month or on a 360 day year basis as agreed, RM98.54 per day. Between 1 November 1999 to the date of judgment on 29 December 2005 is a period of 74 months less 2 days. The profit, by simple arithmetic since the payments meantime is not very significant, for 74 months less two days is RM218,767.49. As agreed the bank is also entitled to penalty of RM3,141.44 as on today. Added to the bank purchase price of RM394,172.06 the total due on the date of judgment is RM616.080.99. After crediting the defendant with all the payments he had made of RM33,454.19, the balance due on the date of judgment is RM582.626.80.

[38] The bank is also entitled to profit per day hereafter until full payment at (RM2,956/30) = RM98.54.

The Charge And The Order For Sale

[39] It was submitted for the defendant that the bank cannot proceed under the charge because the terms are no longer current, and that the bank cannot proceed at all under the letter since there are no new security documents executed under the letter of 1 November 1999 as accepted on 3 November 1999.

[40] These submissions must fail since the defendant had accepted the terms and conditions of the letter of 1 November 1999 by signing acceptance thereto.

As such a binding agreement has emerged between the parties *ad personam* as from 3 November 1999. Although the bank had prescribed conditions in the letter of offer, it is trite law that a person having the benefit of a stipulation in a contract may waive it. In *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476. Edgar Joseph Jr SCJ, delivering a decision in the High Court held:

> By definition, waiver is the abandonment of a right and is either express or implied; it may be implied from conduct which is inconsistent with the continuation of the right (*Keene v. Biscoe* at p 203). A person who is entitled to the benefit of a stipulation in a contract may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. ...

[41] The conditions requiring the execution of a fresh set of documents are deemed to have been waived when the bank made its demand for the installments to be forthwith due and payable. Since it was the defendant who failed to sign the security documents, firstly delaying signing on the excuse of seeking alternative facilities, and thereafter not responding to reminders to execute the security documents, the defendant is estopped from relying upon this ground of objection.

[42] The charge registered on 30 December 1999 had remained on the register, and the defendant has not at any time challenged the validity of the charge or sought to remove it from the register.

[43] A charge registered under the National Land Code as security is a right *ad rem* against the property charged, under an order for sale, to auction the property under the National Land Code so as to release and make available the proceeds to repay monies owed to the chargee. In *The Co-operative Central Bank Ltd v. Y & W Development Sdn Bhd* [1997] 4 CLJ 170 CA it was held:

> A registered charge is not a contract. It is a statutory instrument; a dealing; which the Code authorises. Enforcement of the charge is the assertion of a statutory right. It is not an action upon the covenant.

[44] The only question in an application for an order for sale under s. 256 has been explained in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 by the Federal Court as follows:

> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this Court has been faced on numerous occasions. An application under s. 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg, by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A Judge faced with such complaints will merely say that they do not, on a proper reading of s. 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s. 256 to properly appreciate their true role assigned them by Parliament.

[45] It is, therefore, settled that once it is established that there has been a default, then unless there is cause to the contrary, the order for sale must be given since a charge is an *ad rem* right to dispose of the security to recover a secured debt. It is also settled law that the amount of a debt to be paid is an *ad personam* issue and does not affect the *ad rem* right of the chargee to auction the security to make available funds for repayment.

[46] Now, the charge provided in section 4.01 that:

> The Chargor hereby agrees and declares that this **Charge is expressly intended to be and shall be a continuing security** for the payment of the Monies Hereby Secured **and all other moneys and liabilities now or hereafter from time to time owing or payable** by the Chargor to the Chargee under the provisions of this Charge **and the Property Sale Agreement.**

The above language in the charge itself allows for the charge to be a security not only for the monies secured under the charge but also all other monies and liabilities then or thereafter from time to time owed by the defendant to the bank under the property sale agreement. The language also provided that the charge is a continuing security.

[47] By section 5.01 of the property sale agreement, the defendant had agreed:

A For better securing the payment of the Sale Price or any part thereof as shall be outstanding **and all other moneys whatsoever now or hereafter owing to the Bank by the Customer**, the Customer shall execute a Charge under the National Land Code 1965 over the Property (hereinafter called "the Charge").

B Even though the execution of fresh agreements is envisaged, the letter of 1 November 1999 was clearly a revision of an existing documented facility. In all the circumstances of this case, the letter of 1 November 1999 was clearly in substance an offer of terms to restructure the existing Al-Bai Bithaman Ajil facility, and upon
C acceptance by the defendant, has the effect of varying the terms of the property sale agreement. Those original agreements of the Al-Bai Bithaman Ajil facility transaction were not revoked, and are only replaced upon new security documentation being executed. The execution of new security documents in this case serves the
D purpose of incorporating the amendments under the letter of approval, and does not mean there is a new facility requiring for its validity new documentation. Following the Supreme Court case of *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25 *(supra)* that the correct approach would be to look at the substance and
E not just the label which had been attached to the letter, I find that by accepting the terms and conditions in the 1999 Revised Facility, and with the waiver of conditions as to execution of a fresh set of documentation after the failure by the defendant to execute the same when requested, there has emerged an
F agreement that by its application and interpretation amended the property sale agreement, such that the property sale agreement must be read to incorporate a revised bank purchase price of RM394,172.06 and a revised bank selling price of RM992,363.40.

G **[48]** The bank is, therefore, entitled to rely upon the existing registered charge to recover any sum outstanding from the defendant arising from the terms of the existing property sale agreement and charge as amended by the terms accepted by the defendant on 3 November 1999. The statutory procedural
H requirements had been complied with. There is nothing then to bring the application before the court within the three categories of cause to the contrary established in *Low Lee Lian (supra)* to warrant the refusal of the order for sale.

I **[49]** The court, therefore, grants order for sale by auction under the National Land Code to recover the sum of RM582,626.80 plus profit at RM98.54 per day until full settlement. The property shall be auctioned on 29 March 2006 or such other date

thereafter as the deputy registrar shall fix. The reserved price shall be fixed by the deputy registrar at the estimated market value, and other orders in accordance with s. 257(1)(e) to (h) of the National Land Code. Costs shall be taxed and paid to the plaintiff bank. Since the defendant's submissions failed in part, the costs recoverable by the plaintiff shall be at 50% of taxed costs.